STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

PLAINTIFF-APPELLANT,

v

GERALD LEE BABCOCK,

DEFENDANT-APPELLEE.

SUPREME COURT NO. 121310

COURT OF APPEALS NO. 235518

LOWER COURT NO. 99-95646-FH

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APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE QUESTION PRESENTED

DO THE TRIAL COURT'S REASONS FOR DEVIATING FROM THE GUIDELINES--(1) DEFENDANT AND SOCIETY WOULD BE BETTER SERVED WITHOUT A PRISON SENTENCE, (2) THE PROBATION DEPARTMENT RECOMMENDED PROBATION, (3) THE TRIAL DEFENSE LAWYER BELIEVED THAT THE JUDGE WOULD BE ABLE TO DEPART DOWNWARD, (4) DEFENDANT'S NO LONGER BEING THE PRIMARY CARE GIVER TO HIS BROTHER (AFFLICTED WITH CEREBRAL PALSY AND MENTAL RETARDATION) WOULD REQUIRE HIM PLACED HIM IN A NURSING HOME, AND (5) DEFENDANT HIMSELF HAS DISC HERNIATION–JUSTIFY GIVING A TWO MONTH SENTENCE WHERE THE GUIDELINES CALL FOR 36 - 71 MONTHS?

THE TRIAL COURT AND
THE COURT OF APPEALS ANSWERED: YES

PLAINTIFF-APPELLANT ANSWERS: NO

STATEMENT OF FACTS

This is the second appeal from Jackson County Circuit Court Judge Alexander Perlos' sentencing defendant. Both times he gave the same amount of jail time. On September 23, 1999, defendant pled guilty to two counts of second degree criminal sexual conduct. MCL 750.520c(1)(a). (8a-13a). In return, plaintiff reduced the charge from first degree criminal sexual conduct. MCL 750.520b(1)(a). (8a). Subsequently, on November 4, 1999, Judge Perlos sentenced him to three years probation, with 60 days in jail, even though the guidelines called for 36-71 months. (35a, 39a). Plaintiff then appealed.

After granting leave to appeal, on December 26, 2000, the Court of Appeals reversed and remanded for resentencing. 244 Mich App 64; 624 NW2d 479 (2000). (43a-58a). Defendant did not appeal to this Court.

Then, on June 28, 2001, Judge Perlos sentenced defendant to three years probation starting that day with no extra jail time even though the guidelines still called for 36-71 months. (92a-93a).[1] This time, after again granting leave to appeal, the Court of Appeals affirmed. 250 Mich App 463; 648 NW2d 221 (2002). (95a-99a). This Court granted leave to appeal on September 18, 2002. __ Mich __; __ NW2d __ (2002). (100a).

The facts can be found in the initial Presentence Investigation Report:

> Amanda Clute [born May 23, 1986, defendant's uncle's adopted daughter] told police Gerald Babcock would often have her sit on his lap and *"rub up against his crotch."* This last happened in June, 1999, according to the victim. On that occasion, Babcock reached under her shorts/underwear and

[1]Defendant received 61 days credit for time served.

> put his finger in her vagina. She told police this had happened *"20 times before."*
>
> When police interviewed Babcock, he admitted to placing his finger in the victim's vagina one time. He told the Writer he did this once by inserting a finger up to the first knuckle only. Mr. Babcock appears to be heavily into victim blaming. He would like us to believe the 13 year old victim frequently sat on his lap. She made a habit of then repeatedly moving her pelvic area up against his penis in a repetitive motion while they were both fully clothed. Gerald claims that he would then tell her to stop, but she would continue this behavior. This happened many times by his account.
>
> Amanda Clute also told police she would watch *"porno movies"* with Mr. Babcock. Mr. Babcock told the Writer these movies were on HBO or Cinemax and he would turn the television off when Amanda was present. Gerald insisted that Amanda would then turn the television back on and view the adult movies. She did state that one time when they were viewing these movies, the defendant rubbed her breasts/vagina area with his finger. On that occasion, the defendant committed the one penetration and licked her bare breasts by her account. That occurred in April 1999, and Amanda was only 12 years old.
>
> Mr. Babcock explained he did not want Amanda sitting on his lap and rubbing her pelvic area against him. She would persist and then he would then touch her vaginal area hoping this would satisfy her and she would leave him alone. (17a-18a).

For both counts at both sentencings, the guidelines called for 36-71 months. (34a-35a). Judge Perlos' first Sentencing Information Report Departure Evaluation states:

> The Court has varied from the guidelines in this sentence because the defendant does not have any prior convictions. He should be able to be treated and rehabilitated better outside the prison system. The guideline [sic] appeared to be too severe for the facts of this case. (42a).

The second Sentencing Information Report Departure Evaluation states:

> Substantial and compelling reasons for deviation:

> 1. The Court felt at the first sentencing that the defendant and society would be better served if the defendant is treated outside prison.
>
> 2. Since original sentence, the Probation Agent Mr. Munger, who has under his charge all Jackson County Circuit Court sex offenders, made a recommendation that he has made good progress during the past 18 months and feels the Court should deviate from the guidelines.
>
> Additional reasons for the Court's deviation are found in the affidavit of Mr. Wendell Jacobs who was the trial defense attorney; correspondence from Martha M. Tyler, Special Education Teacher for the defendant's brother who is seriously impaired with cerebral palsy and mental retardation; correspondence from attorney Mellisa E. Mott which explains Mr. Babcock's role in the care of his brother and the hardship that would result to his mother and family if he is taken out of the home.
>
> The Court is also mindful of the defendant's physical condition in view of the letter from Dr. Akram Mahmoud, D.O. which indicates that the defendant has a herniated disc in his back. It is for the foregoing that the Court finds compelling and substantial reasons to deviate from the prescribed guidelines. (94a).

On March 19, 2002, after it had granted leave to appeal, the Court of Appeals affirmed in a published opinion. It first questioned the "abuse of discretion" review standard but found itself bound by its previous opinion. 250 Mich App 467, n 3. (97a). It then found that a number of Judge Perlos' factors are neither objective nor verifiable: "Specifically, the court's belief that defendant and society would be better served if defendant is treated outside prison is neither objective, nor verifiable. "Further, the affidavit of defendant's attorney is neither objective, nor verifiable." 250 Mich App 471. (99a). It also noted that "the probation agent's assertion that defendant is amenable to treatment is neither objective, nor verifiable." 250 Mich App 471, n 5. (99a).

On the other hand, it found that defendant's complying with probation, his herniated disc, and his being involved in providing care for his impaired brother are in fact objective and verifiable. 250 Mich App 471. (99a). It then found no abuse of discretion:

> Although we believe that it is debatable whether the objective and verifiable factors relied on by the trial court constitute substantial and compelling reasons justifying a downward departure from the guidelines range, we cannot conclude that the trial court's decision based on those factors was so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will. [Citation omitted]. Therefore, the trial court did not abuse its discretion in departing downward from the minimum guidelines range. Moreover, for the same reason, we do not believe that the trial court abused its discretion as to the extent of the downward departure. 250 Mich App 471-472. (99a).

This Court's order granting leave to appeal specifically asked the parties to brief the following matters:

> (a) Whether the Jackson Circuit Court satisfied the "substantial and compelling reason" requirement of MCL 769.34(3),
>
> (b) whether the Jackson Circuit Court satisfied the "states on the record" requirement of MCL 769.34(3),
>
> (c) the standard of appellate review for the Court of Appeals in light of MCL 769.34(11), and
>
> (d) the standard of appellate review for this Court. __ Mich __. (100a).

This Court also ordered this case to be argued and submitted with *People v Aliakbar*, #120256. (100a).[2]

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[2]Because plaintiff concludes that Judge Perlos' opinion in fact satisfies the 'states on the record" requirement, it will not address the issue (this Court's second question) in the argument section.

ARGUMENT

WHERE THE GUIDELINES CALL FOR 36-71 MONTHS, 61 DAYS FOR CHILD MOLESTATION WHICH INSTITUTIONALIZED THE VICTIM IS NOT ENOUGH.

For three reasons, this Court should remand for resentencing. First, Judge Perlos "did not have a substantial and compelling reason for departing from the appropriate sentence range." Either the reasons given were not even objective and verifiable or they were not sufficiently extraordinary to legally be a "substantial and compelling reason." Second, even if at least one of the five reasons given somehow meets the standard, because at least one other does not, as this Court stated in *People v Fields,* 448 Mich 58, 80; 528 NW2d 176 (1995), resentencing is mandated. Third, even if resentencing is somehow otherwise not required, it should still be ordered because the reasons given do not justify the deviation degree, 2 months for a 36-71 month guideline range.

REVIEW STANDARD

MCL 769.34(11) states:

> If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

This Court's third and fourth questions are answered as follows. Factual decisions are reviewed for clear error. Whether or not the sentencing court in fact enunciated a substantial and compelling reason allowing a deviation is reviewed de novo. The deviation degree is reviewed for an abuse of discretion.

The Court of Appeals' original opinion correctly pointed out that interpreting this statute starts with this Court's opinion in *Fields, supra.* After all, the Legislature did not define "substantial and compelling reason." *Fields* did. As the first panel stated:

> The Legislature is presumed to be aware of any existing judicial interpretation of words and phrases in the same subject area, and its silence suggests agreement with the court's construction. *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994); *Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989); *Browning v Michigan Dep't of Corrections,* 385 Mich 179, 186; 188 NW2d 552 (1971). The fact that the Legislature chose to use this phrase again after it had been interpreted by our Supreme Court, and did not provide a different definition, evidences that it intended a similar interpretation of the phrase here. 244 Mich App 74-76.

Essentially, *Fields* defined "substantial and compelling reason" as having two components. First, the reason must be "objective and verifiable" rather than merely subjective. 448 Mich 68-69. Second, the reason must be extraordinary ("exceptional"). The reason "justifying departure should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." 448 Mich 67. In so doing, this Court specifically rejected an interpretation "that would allow trial judges to regularly use broad discretion to deviate." 448 Mich 68.

Accordingly, *Fields* set up a three step test for reviewing deviations below a mandatory minimum drug sentence. First, whether or not the reason given is in fact "objective and verifiable" is reviewed de novo. Second, any factual findings are reviewed for clear error. Third, whether or not the reason amounts to a substantial and compelling reason is reviewed for an abuse of discretion.

As indicated in the second panel's opinion, however, the first panel erred in

completely adopting the *Fields* test without any modification whatsoever. Whereas the Legislature did not include a statutory review standard in the drug laws, it did in the sentencing guidelines statute. MCL 769.34(11). This statute's language, "the court of appeals finds the trial court did not have a substantial and compelling reason" cannot be interpreted as allowing for an abuse of discretion standard (for whether or not an enunciated reason is in fact substantial and compelling). The second panel correctly pointed out:

> We question the *Babcock I* holding regarding the abuse of discretion standard of review in light of the language in MCL 769.34(11), which appears to suggest that our review is de novo. . . . We do note . . . that the controlled substances act, and particularly MCL 333.7401(4), which the *Fields* court interpreted, and which the *Babcock I* panel looked to for guidance, does not contain a provision such as that found in MCL 769.34(11). As our Supreme Court noted in *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001), the legislative guidelines have provided new ground rules that may make inapplicable prior controlling law. Therefore, we question the application of *Fields* as to the abuse of discretion standard of review, where *Fields* predates the legislative guidelines, and where MCL 769.34(11) envisions a different standard of review. 250 Mich App 467, n 3. (97a).

As it is, each of the three other States that have a review standard statute for appeals from a trial court having deviated from the guidelines for "a substantial and compelling reason" has interpreted its statute to allow for de novo review. Each of these statutes is similar to Michigan's. Kansas' statute states:

> (d) In any appeal from a judgment of conviction imposing a sentencing that departs from the presumptive sentence prescribed by the sentencing grid for a crime, sentence review shall be limited to whether the sentencing court's findings of fact and reasons justifying a departure:

(1) Are supported by the evidence in the record; and

(2) Constitutes substantial and compelling reasons for departure.

(e) In any appeal, the appellate court may review a claim that:

(1) The sentence resulted from partiality, prejudice, impression or corrupt motive;

* * *

(f) The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the remand or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for sentencing. KSA 1994 Supp 21-4721.

In *State v Favela*, 259 Kan 215, 233; 911 P2d 792 (1996), the Kansas Supreme Court concluded that a claim that the reason does not amount to a substantial and compelling reason for deviating is a legal question that is reviewed de novo.

Oregon's statute states:

In any appeal from a judgment of conviction imposing a sentence that departs from the presumptive sentence prescribed by the rules of the State Sentencing Guidelines Board, sentence review shall be limited to whether the sentencing court's findings of fact and reasons justifying a departure from the sentence prescribed by the rules of the State Sentencing Guidelines Board:

(a) Are supported by evidence in the record; and

(b) Constitute substantial and compelling reasons for departure. ORS 138.222(3).

State v Watkins, 246 Or App 338, 340; 932 P2d 107 (1997), rev den 325 Or 438; 939 P2d

622 (1997), specifically found a de novo review: "We review to determine whether the court's finding of facts and reasons justifying the departure are supported by the evidence in the record and constitutes substantial and compelling reasons to depart as a matter of law."

Washington's statute states:

> (4) To reverse a sentence which is outside the sentence range, the reviewing court must find: (a) Either the reason supplied by the sentencing judge and not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient. RCW 9.994A.210.

In *State v Johnson*, 124 Wash 2d 57, 65-66; 873 P2d 514 (1994), the Washington Supreme Court interpreted this statute as allowing for clear error review for facts, de novo review for whether or not the reasons given are substantial and compelling, and abuse of discretion review for whether or not the sentence is clearly too excessive or lenient.

Each of these cases is right. Michigan's statute, MCL 769.34(11), envisions a de novo review for whether or not the ground is in fact substantial and compelling: "The Court of Appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range." Nothing in the text in any way implies any kind of discretion to be afforded on this point. As this Court unanimously stated in *People v Mc Intire*, 461 Mich 147, 152-153; 599 NW2d 102 (1999):

> Because our judicial role precludes imposing different policy choices than those selected by the Legislature, our obligation is, by examining the statutory language, to discern the legislative intent that may reasonably be inferred from the

> words expressed in the statute. [Citation omitted]. A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." [Citation omitted]. When a Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no room for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case.

As it is, interpreting this statute for a de novo review, rather than an abuse of discretion, better effectuates the Legislature's intent. That intent, of course was to reduce sentencing disparities across the State. After all, what justice is there for a person to receive probation for an offense if sentenced in Washtenaw County where the codefendant (with the same criminal background) receives 10 to 15 years in Jackson County? This Court itself noticed the problem and tried to do something about it in *People v Coles*, 417 Mich 523; 339 NW2d 440 (1983). It then tried again in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). In 1998, the Legislature then took up the cause and imposed standards far stricter than this Court had imposed in either *Coles* or *Milbourn.*

On the other hand, while whether or not the reasons given amount to a substantial and compelling reason should be reviewed de novo, the departure degree should be reviewed under the *Milbourn* abuse of discretion proportionality standard.[3]

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[3]In *People v Hegwood,* 465 Mich 432, 437, n 10; 636 NW2d 127 (2001), this Court recognized the appellate courts' authority to review for departure degree:

> we observe that the statute provides, "A court may depart from the appropriate sentence range established under the [guidelines] if the court has a substantial and compelling reason for *that* departure. . . ." (Emphasis supplied.)" MCL 769.34(3). In light of such language, we do not believe that the Legislature intended, in every case in which a minimal

Because MCL 769.34(11) does not specify just what the review standard should be for a degree departure, this Court should choose the best one. Although much is to be said for a stricter standard, abuse of discretion is really the most workable standard. After all, how will this Court (or any other court) come up with a standard that easily draws the line between, say, 23 and 24 months' deviation? (In other words, what test would allow a Court to easily say that a 23 month deviation does not require a resentencing but a 24 month resentencing does?)

The two States that have specifically addressed this question have chosen the abuse of discretion standard. In *Favela*, *supra*, 259 Kan 242-243, the Kansas Supreme Court chose the abuse of discretion standard because the Kansas statute (like Michigan's statute) does not specifically call for a deviation degree review. Because the Court had only inferentially interpreted the statute to allow for such a review, it chose the most deferential standard, abuse of discretion. No abuse of discretion occurs if the departure extent is consistent with the guidelines' enacted purposes and principles and is proportionate to the defendant's crime and criminal record.

In *Johnson*, *supra*, 124 Wash 2d 65-66, the Washington Supreme Court chose abuse of discretion because it too best effectuates the Legislature's intent on this

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> upward or downward departure is justified by "substantial and compelling" circumstances, to allow unreviewable discretion to depart as far below or as far above the guideline range as the sentencing court chooses. Rather, the "substantial and compelling" circumstances articulated by the court must justify the *particular* departure in a case, i.e., "that departure."

point. As pointed out above, the Washington Legislature had specifically allowed for sentence review if the sentence is "clearly too excessive or lenient." WRC 9.994A.210(4)(b). Such a review, of course, is best done through the abuse of discretion standard.

The same should apply in Michigan. The appellate courts should look at the crime and past record to see if the reasons enunciated for the deviation adequately justify the sentence given. If not, the trial court has abused its discretion and resentencing is required.

To summarize, whenever an appellate court reviews a sentence deviation, it should ask itself four questions:

(1) Are the trial court's factual findings correct?

(2) Do the trial court's enunciated reasons amount to a substantial and compelling reason to deviate?

(3) Did the trial court use improper grounds along with proper grounds to deviate?

(4) Did the trial court abuse its discretion in deviating as much as it did?[4]

The first question is reviewed under the clearly erroneous standard. *Fields*, *supra*. If the answer is "no" (and the error is not harmless), then the case is remanded for

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[4]To a very large extent, this is actually the Seventh Circuit's review standard for the federal guidelines. Even though such departures are ultimately reviewed for an abuse of discretion, *Koon v United States*, 518 US 81, 91; 116 S Ct 2035; 135 L Ed 2d 392 (1996), the review process itself has three steps: (1) Do adequate grounds exist for the departure? (2) Do facts support these grounds? (3) Is the departure's degree linked to the Guidelines structure? The first step is reviewed de novo, the second for clear error, and the third for an abuse of discretion. *United States v Mc Gee,* 226 F3d 885, 902 (CA 7, 2000).

resentencing (without considering the other questions). The second question is reviewed de novo. In asking this question, the appellate court should review for both whether or not the reason(s) is (are) objective and verifiable and whether or not the reason(s) is sufficiently extraordinary to justify a deviation? If the answer is "no," then, once again, the matter should be remanded for resentencing (without asking either of the other two questions). The third question is also to be reviewed de novo. If in fact the record does not sufficiently show that the trial court would have deviated even if it had not considered the improper ground(s), then the matter is to be remanded for resentencing (without considering the last issue). *Fields,* 448 Mich 80. The last question is to reviewed for an abuse of discretion. If the reasons given do not adequately justify the sentence (proportionality), then the matter is to be remanded for resentencing. Not unless all four questions are answered in the trial court's favor is a sentence outside the guidelines to be affirmed.[5]

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[5]Plaintiff assumes that this Court's review standard should be same as the Court of Appeals'. The Legislature mentioning only the Court of Appeals (without capitalizing the name) by no means means that it did not intend this Court to review anything at all. It would have to be far more explicit to take away this Court's constitutional review authority. Therefore, whether the statute specifies or not, this Court (to the extent that it has the ability to choose otherwise) should choose the same standard that the Court of Appeals has. Absolutely nothing is to be gained by having this Court with a broader or narrower standard than the Court of Appeals has.

SUBSTANTIAL AND COMPELLING REASONS[6]

Using this test shows that defendant should be resentenced. This test's second, third, and fourth questions cannot be answered supporting the trial court's reasons. In other words, this Court's first question is to be answered, "no."

MCL 769.34(3) states (in part):

> A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.

Using this test shows that defendant should be resentenced. This test's second, third, and fourth questions cannot be answered supporting the trial court's reasons. In other words, this Court's first question is to be answered, "no."

Judge Perlos did not enunciate a single ground that may legally be called a substantial and compelling reason to depart. Each of his reasons were either not objective or verifiable or not legally "exceptional." By law, none of them justify a departure.

(1) The judge believing that defendant and society would be better served by probation rather than prison. The Court of Appeals quite correctly concluded that Judge Perlos' first ground was improper: "Specifically, the Court's belief that defendant and society would be better served if defendant is treated outside prison is neither objective nor verifiable." 250 Mich App 471. (99a). Absolutely no reason exists to disagree with this

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[6]Actually, if plaintiff's proposed standard is accepted, this Court need not analyze further. Because the Court of Appeals never did conclude one way or the other whether or not the enunciated departure reasons legally amount to a "substantial and compelling reason," this Court could just remand to it to reconsider using the proper standard.

conclusion.

(2) The probation officer's recommendation. Once again, the Court of Appeals correctly concluded that at least part of this ground is also improper: "We do note that the probation agent's assertion that defendant is amenable to treatment is neither objective nor verifiable." 250 Mich App 471, n 5. (99a).[7]

The other part, that defendant had not violated probation in the 18 months between the two sentencings, although objective and verifiable, does not legally amount to a substantial and compelling reason. As this Court pointed out in *Fields*, 448 Mich 67, the reasons should "keenly" or "irresistibly grab our attention." They are to be extraordinary. Our probationary system is not so big a failure that a probationer not violating the rules for 18 months can be called extraordinary. Although defendant doing well on probation is certainly laudable, it is not a justification for deviating from the guidelines. Instead, it is a justification for sentencing on the low side of the guidelines. Our courts expect people on probation to not violate the rules. Calling defendant's not violating the rules for 18 months "exceptional" means that very few people actually do as well as he did. In other words, most people would have violated probation in that time. Because no one is willing to claim that our probationary system is such an abysmal failure, defendant's following the rules for 18 months, although laudable, is not extraordinary. He should not

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[7]Actually, Judge Perlos incorrectly claimed that the probation officer "feels the Court should deviate from the guidelines." (94a). Although certain parts of the presentence report can be read that way, it still recommended "prison." (60a). In other words, at best from Judge Perlos' perspective, the presentence investigator gave conflicting signals.

be rewarded beyond the norm for doing what is expected of him.[8]

(3) The original defense lawyer filed an affidavit claiming that he believed that this case called for a downward deviation. Once again, the Court of Appeals correctly concluded that this too is an improper ground: "Further, the affidavit of defendant's attorney is neither objective nor verifiable." 250 Mich App 471. (99a). Again, no reason exists to contradict this conclusion.

(4) Defendant helping care for his mentally retarded brother with cerebral palsy. Although this ground is in fact objective and verifiable, it is not legally "exceptional." As a matter of law, it does not justify a deviation. Although his lawyer has claimed that "his presence in the home is vitally important for the care of his developmentally disabled brother" (answer to application, p 11), defendant himself has never made any such statement. Further, neither his family nor anyone else who know the situation have made any such statement either. Nothing in the record shows that taking defendant out of the home will keep his brother from being cared for. At worse, he will be sent to a private nursing home (for as long as defendant is not at home) without any extra cost to the family.

Apparently, some type of trust (possibly, personal injury settlement) has been set up for defendant's brother. He actually has the financial consultant from Salomon, Smith, Barney. (33a). He also has a medical case management nurse, paid for by the Lopatin, Miller law firm in Detroit. (68a). This nurse is the only person that has said what

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[8]As it is, in *People v Johnson (On Remand),* 223 Mich App 170; 566 NW2d 28 (1997), now Justice Young concluded that the defendant's trying to turn himself around is not objective and verifiable.

would happen if defendant were taken out of the home. Her only concern is nothing more than that his brother would be placed in a nursing home because the estate cannot provide 24 hour private duty care for any significant amount of time. In other words, absolutely nothing in the record shows defendant to be "indispensable."

Many cases have found a situation as the present an inadequate reason to deviate. In fact, the federal guidelines themselves specifically discourage this as a ground for deviation. USSG 5H1.6. In *United States v Rybicki*, 96 F3d 754, 756-759 (CA 4, 1996), the Fourth Circuit found an abuse of discretion where the sentencing court deviated downward because the defendant had both a neurologically impaired 9-year-old child who needed special supervision and a wife with fragile mental health.[9] In *United States v Sweeting*, 213 F3d 95, 104 (CA 3, 2000), cert den 531 US 906; 121 S Ct 249; 148 L Ed 2d 180 (2000), the Third Circuit found an abuse of discretion where the trial court had deviated downward because the defendant was a single mother and sole provider for five children, one of whom had a substantial neurological impairment which required special care. In *United States v Allen*, 87 F3d 1224, 125 (CA 11, 1996), the Eleventh Circuit found an abuse of discretion where the trial court had deviated downward because the defendant was a primary caretaker for his father who had both Parkinson's and Alzheimer's.

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[9]A federal sentencing court does not have as stringent a standard for departure as does a Michigan sentencing court. Instead of a "substantial and compelling" reason standard, a federal sentencing court may deviate if it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that proscribed." 18 USC 3553(b). Because this standard is not as stringent as Michigan's, these federal cases become *very* relevant.

Over all, the courts have refused to allow a deviation for family problems unless the defendant himself is "irreplaceable or otherwise extraordinary." *United States v Pereira*, 272 F3d 76, 82 (CA 1, 2001). In *Pereira*, the First Circuit found that the defendant shopping, cleaning, and preparing food for his parents was not irreplaceable. It specifically pointed out that the parents could either move in with other siblings or into an assisted living facility or home nursing arrangement. 272 F3d 82. Even though the care level would not necessarily be quite as high, the alternatives' kept the defendant from being called "irreplaceable." 272 F3d 83. His being "unique" did not mean that he was "extraordinary." *Id.*

In *United States v Archuleta*, 128 F3d 1446, 1450 (CA 10, 1997), the Tenth Circuit found an abuse of discretion where the defendant was the sole support for two children and an elderly, diabetic mother. Although the situation was "difficult" and "sympathy evoking," the defendant had not shown either that other relatives could not care for them or that home nursing or other alternative services were not available.

The Courts have even gone so far as to say that possibly having to place the dependent with either non-relatives or in foster care is not enough to call the defendant "indispensable." *United States v Reed*, 264 F3d 640, 655 (CA 6, 2001), cert den __ US _; 122 S Ct 1374; 152 L Ed 2d 366 (2002); *United States v Leandre*, 328 US App DC; 132 F3d 796, 807-808 (1998), cert den 523 US 1131; 118 S Ct 1823; 140 L Ed 2d 959 (1998); *United States v Brand*, 907 F2d 31, 33 (CA 4, 1990), cert den 498 US 1014; 111 S Ct 585; 112 L Ed 2d 590 (1990). After all, "all families suffer when one of their members goes to prison." *United States v Shortt*, 919 F2d 1325, 138 (CA 9, 1990). The issue is not support

and value. Unquestionably, a defendant is important and valuable to his family. *United States v Louis*, 300 F3d 78, 82 (CA 1, 2002). However, "disruption of the defendant's life, and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration." *United States v Johnson*, 964 F2d 124, 128 (CA 2, 1992).

As pointed out above, following the guidelines will not mean that defendant's brother will not receive care. No one is claiming that. In fact, no one is claiming that he will not receive the same quality (or even better) care. No one is even claiming that the family would even have to pay any money at all. All that is being claimed is that the brother may have to be put into a private nursing home for as long as defendant is in prison. Although such a situation is hardly ideal, it is not a situation that irresistibly grabs someone's attention. Defendant himself is not indispensable to his brother being properly cared for. As a matter of law, this ground is not substantial and compelling.

(5) Defendant's herniated disc. Once again, although this ground is in fact objective and verifiable, it too is not "exceptional." Although defendant is in pain and his condition is deteriorating, he has made no allegation whatsoever that he cannot obtain proper medical care in prison. Without such proof, this claim, is not "extraordinary" either.

As pointed out in *United States v De Pew*, 751 F Supp 1195, 1199 (ED Va, 1990), aff'd 932 F2d 324 (CA 4, 1991):

> Except in extraordinary circumstances, defendant's physical condition, while lamentable, is no basis for a departure. Except in extraordinary circumstances not present here, terminally ill persons who commit serious crimes may not use their affliction to escape prison. Were this rule otherwise, the law's deterrent effect would be unreasonably and unnecessarily diminished in the case of terminally ill persons.

Accordingly, both *De Pew* and *United States v Rivera-Maldonado*, 194 F3d 224, 236 (CA 1, 1999), found that, as a matter of law, defendants suffering from AIDS are not entitled to a downward departure. After all, once again, the federal guidelines specifically discourage departures based on physical ailment. USSG 5H1.4.

As pointed out above, defendant has not in the least claimed that he will not be able to obtain adequate medical care in prison. He does not even claim that he cannot even receive just as good medical care. Instead, he is claiming nothing but his medical condition gives him a special exemption not available to most other sex offenders in his class. Because he has never shown that he cannot be adequately cared for in prison, this ground is not legally sufficient either to deviate downward.

Thus, not a single ground can legally be called "substantial and compelling."[10] Accordingly, MCL 769.34(11) requires "the court [to] remand the matter . . . for resentencing."

BOTH IMPROPER AND PROPER REASONS

In the alternative, even assuming that at least one ground is in fact substantial and compelling, this Court should still remand. Under no circumstances are all five of them substantial and compelling. As this Court ruled in *Fields*, 448 Mich 80, in such a situation, the matter is to be remanded for resentencing:

Sentencing normally is not a job for the appellate court, the

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[10]Although not directly addressing the issue, the Court of Appeals' second opinion stated "that it is debatable whether the objective and verifiable factors relied on by the trial court constitutes substantial and compelling reasons justifying a downward departure from the guidelines range." 250 Mich App 471. (99a).

> usual procedure being to send the case back to the trial judge for resentencing if it found that the sentence is in some respect deficient. [Citation Omitted]. It is unclear whether the trial judge in this case would have found substantial and compelling reasons to deviate from the statutory minimum solely on the basis of objective and verifiable factors.

Likewise, in the present case, Judge Perlos did not in any way delineate his reasons. He did not, for example, say that he had five independent reasons for departing, either justifying both the departure and the departure's degree. The Court of Appeals' second opinion completely ignored *Fields* and affirmed despite finding some of the grounds improper. To the contrary, the law requires a resentencing.

Fields is not the only case that has remanded for resentencing in this situation. In *People v Perry*, 216 Mich App 277; 549 NW2d 42, 45 (1996), now Justice Taylor wrote:

> Because we find that the sentencing court considered factors that were appropriate in conjunction with those that were not, we remand to the trial court for a determination whether the court still finds substantial and compelling reasons to deviate when confined to only the appropriate considerations.

Other courts as well have the same rule. In *Reed, supra*, 264 F3d 652, the Sixth Circuit as well said that when a judge gives both valid and invalid reasons for departing, remanding is necessary unless the judge would have imposed the same sentence anyway.

In fact, in *State v Wilson*, 111 Or App 147, 152; 826 P2d 1010 (1992) (cited in *Fields*, 73-74), the Oregon Court of Appeals remanded for resentencing where three of the six reasons were not sufficiently exceptional to justify the deviation. Just last year,

Oregon continued following this approach. *State v Wolff*, 174 Or App 367, 371; 27 P3d 145 (2001). Thus, even if one of the grounds is in fact legally substantial and compelling, because at least one is not, this case must be remanded for resentencing.

DOWNWARD DEVIATION DEGREE

At the very least, even if all five grounds are found to be substantial and compelling, resentencing is still required. At the very least, Judge Perlos abused his discretion in deviating so much: two months for a 36-71 month range.

No matter how one looks at it, two months for a 36-71 month range is an extraordinarily large deviation. Although defendant has no prior criminal record, the crime itself was so aggravated that the guidelines scored as high as they did. Defendant contributing to institutionalizing the victim calls for more than just two months.

That this is in fact a serious offense and that the departure is indeed radical can be seen by looking at the federal guidelines. If defendant had been convicted of the corresponding federal offense, 18 USC 2243(a), the guidelines would score out to 41-51 months (even though neither any injury to the victim, OV 3 and OV 4, nor the number of penetrations, OV 11, is scored). His Base Offense Level is "18." USSG 2A3.2(a). Because the victim in this case was in defendant's "custody, care, or supervisory control," the level is increased by 2. 2A3.2(b).[11] Then, because defendant was convicted of two counts, two more levels are added. 3D1.4.[12] Hence, defendant has an Offense Level of

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[11]This scoring corresponds to OV 10, which was scored in the present case.

[12]This corresponds to PRV 7, also scored.

22. Because his Criminal History Category is I, the guidelines are "41-51." In other words, the federal system considers this also to be a very serious offense, with a higher minimum than Michigan has.[13] At the very least, Judge Perlos abused his discretion in so vastly deviating from the guidelines.

RELIEF

ACCORDINGLY, plaintiff asks this Court to remand for resentencing.

Respectfully submitted,

November 5, 2002

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CHIEF APPELLATE ATTORNEY

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[13]Actually, just how the federal guidelines are calculated depends on how the sentencing court would calculate USSG 3E1.1(a), accepting responsibility. Although defendant eventually pled guilty, by the first sentence, Judge Perlos said that he does not "fully appreciate what you did here." (37a). On the other hand, by resentencing, defendant seems to have improved in that regard. If the sentencing court decreases the offense level by 2 levels because of 3E1.1, the federal guideline range would be 33-41 months. Even though this minimum is a little below Michigan's minimum in this case, it is still vastly above the sentence actually given.